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PURSUING OPEN SPACE PRESERVATION: THE MASSACHUSETTS CONSERVATION RESTRICTION

*By Russell R. Sicard**

INTRODUCTION

The failure of traditional forms of land use controls to adequately protect socially valuable undeveloped land from development has stimulated experimentation with new methods of preserving open space. Statutes recently enacted in many states¹ which attempt to arrest undesirable development by allowing governmental acquisition of less than fee simple interests in land have been of central importance. A major impetus for passage of these statutes was a 1959 study by William A. Whyte proposing, *inter alia*, governmental acquisition of development rights *only*, leaving all other rights of ownership in the grantor, including the right of possession.² The need for, and purpose of, these new open space preservation statutes has been well articulated by the New Jersey legislature in connection with its enactment of a law granting to certain governmental bodies power to acquire "interest[s] or right[s] consisting, in whole or in part, of a restriction on the use of land by others"³ Recognizing that preservation of adequate open space was in the public interest, and noting that presently inadequate reserves of open space would diminish in the face of ever-mounting developmental forces, the New Jersey legislature sought to use this new technique of open space preservation to assure the orderly development of land and the preservation of open spaces.⁴ It was with similar considerations in mind that the Massachusetts legislature undertook in the late 1960's to enact its own program for the acquisition of rights, defined to be less than a full fee interest in land,⁵ that are "appropriate to retaining land or water areas predominantly in their natural, scenic, or open condition."⁶ The Massachusetts statute⁷ reaches beyond Professor Whyte's technique and many comparable state enactments by describing the less than fee interest in-

volved as a "conservation *restriction*", rather than as a "conservation *easement*." The import of this unique classification will be discussed, and the Massachusetts Conservation Restriction Law analyzed, in this article.

Income and real estate tax incentives, which encourage private use of the Massachusetts law, will be explored. Lastly, the conservation restriction concept will be briefly compared with other open space preservation techniques.

I. BACKGROUND: THE MASSACHUSETTS MARKETABLE TITLE ACT

In Massachusetts, restrictions on the use of land, other than conservation and preservation restrictions as defined in the Massachusetts Conservation Restriction Law, are subject to the stringent requirements set forth in the Massachusetts Marketable Title Act.⁸ The benefits of this exception⁹ for conservation restrictions are noted below. Essentially, the Massachusetts Marketable Title Act is designed to defeat perpetual or long standing restrictions that impair the alienability and use of land. As one court has noted, the Act "enable[s] one or more landowners to remove or prevent the enforcement of obsolete . . . restrictions."¹⁰

A. *Technical Requirements*

The Massachusetts Marketable Title Act is a "statute of limitations" type with fifty years as the determinative period.¹¹ As such, the Act provides that certain land use restrictions or other claims will be extinguished unless the persons holding them have recorded their interests within the statutory period. If any individual holds clear record title in a fee for the designated period, all unrecorded restrictions on the fee will be extinguished automatically.¹²

The effective date of the Act is January 1, 1962. In order for restrictions imposed on or after this date to be enforceable, certain conditions must be met.¹³ Even if these threshold conditions are met, no restriction will be enforceable after thirty years unless it is part of a "common scheme"¹⁴ or unless re-recorded before the expiration of the initial thirty years.¹⁵ Upon such re-recording, the restriction is extended for another twenty years. The recorded notice of the restriction must comply with designated formalities.¹⁶

Substantially similar treatment is given to restrictions imposed before the Act's effective date, except that such restrictions may be re-recorded within the expiration of fifty years from their imposition or before January 1, 1964, whichever is later.¹⁷ Thus, the Act ". . . essentially provides for saving periods during which existing rights

can be preserved.”¹⁸ Twenty year re-recording intervals are also required. Section 29 sets out prerequisites which must be met for such recorded notice, and consequent extension of the restriction, to be effective.

B. Additional Prerequisites to Enforcement

Even where the above mentioned technical and formal recording and re-recording requirements have been satisfied, other obstacles to enforcement of a restriction remain. These obstacles are articulated in § 30 of chapter 184. Section 30 provides that a restriction will not be enforced, whether or not re-recorded pursuant to the scheme detailed above, unless it is found to be of “actual and substantial benefit” to the one claiming the right to enforce it. Even where such benefit can be found, a restriction will not be enforceable¹⁹ where changes in the neighborhood have “materially reduced” the need for the restriction, or have rendered it “obsolete.” Similarly, the restriction will be unenforceable where conduct of those in a position to enforce it has rendered such enforcement inequitable (as by laches); or where continued enforcement of the restriction would impede the “reasonable use of the land,” impair the neighborhood’s growth, or be inconsistent with the public interest.

Although there is some saving language in this portion of the Act (i.e., a restriction could be found to be “consistent with the public interest,” as helping to attain “the reasonable use of land”), the Act’s thrust is very definitely adverse to the enforcement and long term validity of restrictive agreements voluntarily entered into, and is conducive to land transfer and development. The continuance of a restriction is endangered by court findings of “original purpose,”²⁰ “obsolescence,” “material reduction,” “intent,”²¹ etc. Such findings, occurring many years after creation of the restriction, when the original parties are no longer available and other conditions have changed, may be open to subjectivity and inconsistency.

Moreover, the burden will be placed on the party seeking enforcement to prove that the restriction does not violate § 30. The party may be asked to show, for example, that a height restriction was imposed as part of a common scheme and was for the benefit of the entire tract.²² The possibilities of a finding of unenforceability are, therefore, greatly enlarged, and a court will be constrained to note carefully if it does decide in favor of enforceability, that its decision does no dishonor to § 30.²³

II. THE MASSACHUSETTS CONSERVATION RESTRICTION LAW

Conservation easements and covenants can be valuable tools of open space preservation. However, their "potential cannot be reached in some jurisdictions either because the applicable [statutory and] common law is not clear or because it imposes significant limitations on the flexibility of the devices."²⁴ Such was the case in Massachusetts prior to enactment of the new law. Clearly, conservation restrictions could not serve the purposes for which they were created if they were subjected to the hostile judicial treatment generally afforded to restrictions on the use of land under the Massachusetts Marketable Title Act. Consequently, conservation restrictions have been excluded from the effects of the Marketable Title Act by § 26 of that Act. Moreover, through careful drafting, relevant common law limitations have been circumvented by the Massachusetts Conservation Restriction Law (embodied in §§ 31-33 of Chapter 184) in order to ensure "protect[ion of] Conservation and Preservation Restrictions held or approved by appropriate public authorities."²⁵

A. *Method of Acquisition*

The basic method of acquisition of conservation restrictions is through consensual agreement between the acquiring party and the landowner; *i.e.*, through private sale or donation. Restrictive agreements involving acquisition of the restriction by a private party will not qualify. Rather, the acquiring party must be either a governmental body, that is, "the United States or the commonwealth, acting through any of its departments, divisions, commissions, boards or agencies, or any political subdivision or public instrumentality thereof or any public authority";²⁶ or a "charitable corporation or trust whose purposes include conservation of land or water areas or of a particular such area."²⁷

To qualify for the lenient treatment afforded by the statutory scheme, the conservation restriction must be approved by the Commissioner of Natural Resources if held by a governmental body; or be approved by certain representatives of the city or town in which the land is situated *and* by the Commissioner of Natural Resources if held by a charitable corporation or trust.²⁸

The Massachusetts Act, like its New Jersey counterpart,²⁹ authorizes acquisition of conservation restrictions through the use of eminent domain³⁰ as well as by consensual agreement. This authorization is deemed by some commentators to be essential to the effec-

tiveness of any open space program, since consensual arrangements may not be forthcoming in many situations. They contend that:

The effects of open-space programs on the social and economic life of urban and suburban communities are far too serious to allow them to be exposed to haphazard implementation through consensual arrangements with willing property owners.³¹

Nevertheless, the power to acquire conservation easements through eminent domain has not been conferred by open space statutes in other states.³²

B. Definition and Content

Conservation restrictions are rights appropriate to keeping "land or water areas predominantly in their natural, scenic or open condition or in agricultural, farming or forest use."³³ They also include rights appropriate to forbid or limit certain activities on the land:

(a) [C]onstruction or placing of buildings, roads, signs, billboards or other advertising, utilities or other structures on or above the ground, (b) dumping or placing of soil or other substance or material as landfill, or dumping or placing of trash, waste or unsightly or offensive materials, (c) removal or destruction of trees, shrubs or other vegetation, (d) excavation, dredging, or removal of loam, peat, gravel, soil, rock or other mineral substance in such manner as to affect the surface, (e) surface use except for agricultural, farming, forest or outdoor recreational purposes or purposes permitting the land or water area to remain predominantly in its natural condition, (f) activities detrimental to drainage, flood control, water conservation, erosion control or soil conservation³⁴

Those activities not expressly referred to in the Act are covered by the catch-all subsection citing "other acts or uses detrimental to such retention of land or water areas."³⁵ The Legislature has on the one hand clearly defined what rights are to qualify under these sections as conservation restrictions. At the same time, it has provided flexibility. Such flexibility in determining the type of restriction that will qualify as a conservation restriction is necessary if consensual agreement between the landowner and the acquiring body is to be the backbone of the conservation restriction program.

Yet, a reasonably precise definition of rights qualifying as conservation restrictions is necessary for an effective program. A vague definition of rights given under a restriction agreement may impede enforceability.³⁶ Furthermore, restrictions not within the ambit of the legislative purposes should not be able to take advantage of

these provisions by mere *pro forma* recital of good purposes. The public and charitable bodies authorized to hold conservation restrictions are entrusted with responsibility for ensuring that such abuse does not occur.

Since the law states that a conservation restriction is a right that will keep land *predominantly* in its open condition, certain structures on the land and other uses made of it by the owner are not precluded when a restriction is imposed. Conservation restrictions have been approved by the appropriate government bodies even though they allow for construction of houses,³⁷ boathouses,³⁸ docks,³⁹ and the posting of signs indicating ownership.⁴⁰ Many restrictions state that all rights not expressly given are reserved to the grantor, thus allowing a range of consistent uses.⁴¹ One restriction document even allows the grantee discretion as to what other uses, in addition to those noted in the agreement, "detrimental to retention of land in its natural condition,"⁴² are to be prohibited.

The Legislature intended that the substance of a restriction rather than the terminology used in describing it be controlling in determining whether it qualifies for treatment under the law. Any restriction appropriate to retaining a natural, scenic or open area that forbids or limits certain activities "whether or not stated in the form of a restriction, easement, [or] covenant"⁴³ may qualify. Thus, "negative" restrictions or easements may be upheld under the law in spite of common law impediments to their enforceability.⁴⁴

C. Recordation Requirements

Section 33 requires that public restriction tract indexes ("a map or set of maps") be created and filed with the register of deeds to provide for the indexing of conservation and preservation restrictions along with other restrictions held by any governmental body. Certain maps "used by [tax] assessors to identify parcels taxed" will suffice for this purpose. Indexing of restrictions on these maps must include a description of the land restricted, the name of the person or body holding the restriction, and the place in the public records where the instrument imposing the restriction can be found. The purpose of this system is the same as that for all systems of recording interests in land: to provide notice in a public record that the land is so encumbered, so that anyone dealing with the land in the future will be sufficiently aware of which interests remain with the fee and which interests have been separated from it. Under § 33 such notice must be given by an official of the governmental body holding the restriction, by the Commissioner of Natural Re-

sources, or by an official of the charitable corporation holding the restriction.

Most importantly, conservation restrictions indexed on a public restriction tract index pursuant to § 33 do not have to be refiled to remain enforceable. Thus, conservation restrictions may be made perpetual, the initial indexing satisfying the notice requirement for as long as the restriction might last. Other restrictions *not* so indexed will not satisfy the notice requirement, and will not be enforceable unless recorded in the usual statutory manner (*i.e.*, they must be re-recorded within thirty years of the initial recording and within each twenty years thereafter).

This notice requirement for conservation restrictions not properly indexed is less demanding than that found in the Massachusetts Marketable Title Act. Under § 27 of that Act, in addition to the requirements of refiling, other technical requirements must be met before a restriction becomes enforceable.⁴⁵

D. Enforceability

Since conservation restrictions are a relatively recent addition to the law of real property, the way in which they will be treated by the courts has not yet been definitively determined. There is argument to the effect that they will be classed as negative easements because they require a landowner to refrain from doing certain things with his property.⁴⁶ Other authority indicates that the types of interests in land necessary to accomplish open space preservation (conservation restrictions) will be treated by the courts as restrictive covenants.⁴⁷ Whatever treatment the court elects, enforcement of the restriction would become bound up in the technical requirements necessary for enforcement of such interests under traditional property law concepts.

Many courts will not enforce a negative easement unless it is "appurtenant to" a benefitted piece of land.⁴⁸ At this point, the distinction between easements in gross and easements appurtenant becomes relevant. Unless the easement over a parcel of land (servient estate) is for the benefit of a different parcel of land (dominant estate) the easement is said to be "in gross." An easement in gross is considered an interest in the land personal to the original holder and the courts are reluctant to enforce it after transfer of the land. A common example of an easement in gross is a "naked right to pass and repass over the land of another [right of way]." ⁴⁹ Such a right ⁵⁰ "is not, in any proper sense, an *interest or estate in the land itself* [emphasis added]. [It] is in its nature personal; it attaches itself to the person of him to whom it is granted and must die with the

person.”⁵¹ As such, it is *not* assignable or inheritable.⁵² However, if the holder of the easement also holds a benefitting parcel of land (if the right of way is necessary for him to get to his land), then the easement is assignable and inheritable because it is considered an interest in *the adjacent dominant estate* rather than *in the person*. Therefore, under the common law of real property, an easement cannot be transferred or assigned unless it benefits a particular piece of land.

Even if a jurisdiction were to recognize negative easements in gross, doubt has been expressed as to their assignability.⁵³ The interpretive commentary of the Wisconsin statute⁵⁴ authorizing the acquisition of restrictions for public benefit notes the propensity of some American courts to follow an old English case denying enforcement to a covenant to one who owns no benefitted land. To “avoid this technical pitfall” the Wisconsin legislators included a provision in their statute providing that such a requirement would not be necessary in order for the public body holding the right, to enforce it. The Massachusetts legislature has similarly precluded the creation of such difficulties in § 32 of the Conservation Restriction Law.

Section 32 of the statute is of primary importance to the success of a conservation restriction. Under this Section any conservation restriction held by any governmental body or by a qualifying charitable corporation or trust will not have to conform to the bulk of the complex, technical common law requirements which have plagued courts and landowners for years in their attempts to interpret and enforce restrictions on the use of land. More specifically, any right which (1) conforms to the definition of a conservation restriction under § 31 and (2) is held by one of the entities mentioned above, will not be “unenforceable on account of lack of privity of estate or contract, or lack of benefit to particular land or on account of the benefit being assignable or being assigned to any other governmental body or to any charitable corporation or trust with like purposes.”⁵⁵

The effect of this legislation, then, is a clarification of “an intolerably opaque area of the law . . . enabl[ing] government and the private sector to participate in preservation and conservation programs confident that some hoary doctrine will not frustrate their reasonable expectations.”⁵⁶

Section 32 further provides that the restrictions may be enforced by an injunction or proceeding in equity. It gives the holder the affirmative right to police the restriction to insure compliance. Occasionally, an easement allowing the grantee to enter onto the prem-

ises and inspect for violations is granted along with the conservation restrictions.⁵⁷

E. Release

Restrictions may be released "in whole or in part . . . for such consideration, if any, as the holder may determine," but only following a public hearing held after reasonable public notice. The requirement that a public hearing be held before any action is taken will safeguard against the use of variance practices that have proved so dangerous and arbitrary in the administration of the zoning power.⁵⁸

To avoid unnecessary resort to the cumbersome public hearing procedure, a well drawn restriction should attempt to define at least some of the modifications in the use of the land permissible under the restrictive agreement. It may also be desirable to set out in the initial agreement or in the statute itself a method for calculating the "consideration" necessary for release of the restriction.⁵⁹

Section 32 provides guidelines for use by the governmental body "acquiring, releasing or approving" the restriction "[i]n determining whether the restriction or its continuance is in the public interest," implying that the body may from time to time review the status of restrictions acquired and release those they feel are no longer in the public interest.⁶⁰ Since local government occupies a pivotal position in the administration of the program, the legislature has determined that those bodies must have a wide range of authority in dealing with restrictions if the program is to be effective. This delegation of power is granted upon the assumption that the local government will best be able to evaluate the needs of their community at any one time.

III. FEDERAL INCOME TAX CONSEQUENCES OF A GIFT OF A CONSERVATION RESTRICTION

Under federal law a charitable contribution is defined as a gift made for public purposes to or for the use of numerous entities, including any political subdivision of the United States, or for the United States, or any corporation, trust or foundation organized exclusively for charitable purposes.⁶¹ "Governmental body" as referred to in the Massachusetts Conservation Restriction Law⁶² certainly fits into this category, as do the "charitable corporations or trusts"⁶³ also referred to in the law. A deduction from gross income is allowed for any charitable contributions made within the taxable year⁶⁴ as

long as such deduction is not precluded by the percentage limitations set forth in the Internal Revenue Code.⁶⁵

Gifts of cash can be deducted up to 50 percent of the taxpayer's contribution base⁶⁶ for the taxable year.⁶⁷ Gifts of capital gain property are treated differently. For charitable contribution purposes, "capital gain property" means any capital asset (valued at its fair market value) which when sold at the time of the contribution, would have resulted in long-term capital gain.⁶⁸ Since the gift of a conservation restriction is deemed to be a gift of capital gain property,⁶⁹ deductions for it are limited to 30 percent of the taxpayer's contribution base for the taxable year.⁷⁰ If a certain contribution of capital gain property exceeds the 30 percent limitation, the excess is treated as a carryover for the five succeeding taxable years,⁷¹ allowing the deduction to be taken over a six year period. If the taxpayer elects to reduce his contribution by specified amounts, the percentage limitation is increased to 50 percent of his contribution base.⁷² Payment of capital gains tax will be avoided where a charitable contribution is made and thus the donor will save this money. A similar savings will be realized under Massachusetts income tax law.⁷³

Certain provisions in the Federal Internal Revenue Code (the Code) disallow deductions for charitable and other gifts in various cases.⁷⁴ Specifically, the Code states that "[w]here a donor transfers an interest in property (other than a remainder interest in a personal residence or farm or an undivided portion of [his] entire interest in the property)"⁷⁵ no deduction will be allowed. Therefore, for a charitable contribution of a conservation restriction to be deductible it must fall within the scope of the "undivided portion of the donor's entire estate in the property" exception.

Where a grantor conveys a percentage of all rights held by him in the property—such conveyance extending over a period covering the entire term of his interest in that property—he has given an undivided portion of his entire interest. An example of this type of partial interest would be a contribution of 50 acres to a charitable organization by a taxpayer who owns 100 acres of land. Also, where a donor contributes property to a charitable organization making that organization a tenant in common with him, a deduction is allowed.⁷⁶

Federal Income Tax Regulations (the Regulations) eliminate much trouble in this area by affirmatively stating that:

. . . a charitable contribution of an open space easement in gross in perpetuity shall be considered a contribution of an undivided portion of

the donor's entire interest in property to which section 170(f)(3)(A) [disallowing certain deductions] does not apply. For this purpose an easement in gross is a mere personal interest in, or right to use, the land of another; it is not supported by a dominant estate but is attached to, and vested in, the person to whom it is granted.⁷⁷

The Regulations go on to give examples of what restrictions on the use of property will qualify for treatment under this subparagraph. These include "restrictions on height and type of building, removal of trees, erection of utility lines, dumping of trash, and use of signs."⁷⁸

Although this regulation alleviates the potentially troublesome "undivided portion" terminology, it has been noted that certain other potential difficulties remain.⁷⁹ One such potential difficulty arises from the use of the phrase "open space" in the Regulation. It has been held that a gratuitous conveyance of a restrictive easement in perpetuity, the purpose of which was to preserve certain scenic views (scenic easement) is a charitable contribution for which a deduction will be allowed under section 170.⁸⁰ The grantor is eligible to deduct the fair market value of the restrictive easement given, such value being that which one willing, but not compelled, to buy would pay to one willing, but not compelled, to sell—all relevant facts being reasonably known by both.⁸¹ An adjustment must be made in the basis⁸² of the property by "eliminating that part of the total basis of the property allocable to the restrictive easement granted."⁸³

This ruling, the term "open space," and the examples of qualifying restrictions given in the Regulations appear to cover many kinds of conservation restrictions. Yet, an uncertainty has been expressed as to whether various other types of restrictions, including rights of way for hiking or horseback riding, flowage easements for dams or flood plains, historic preservation restrictions, and restrictions that will allow construction of certain structures consistent with the objectives of the restrictions (*e.g.*, boat houses, lookout towers)⁸⁴ are to be included.

It may be persuasively argued that the purpose of the restrictions mentioned above, including those that permit construction of buildings or other facilities, is to facilitate the enjoyment of the "open spaces" by the public, especially where the public has access to the land and a "right to use" it, whether for a scenic view, or for hiking. Many restrictions currently in force in Massachusetts do allow for public access to the land. Most, however, allow for only limited or no public access at all. For example, a restriction in the town of

Dartmouth provides for exclusive access by members of the Audubon Society, and only during two thirty-day periods each year.⁸⁵ Restrictions in Yarmouth and Lexington allow for access to town residents only.⁸⁶

The majority of conservation restrictions presently in existence do nothing more than arrest development on a certain parcel of land. They do not allow for any public access to the land at all.⁸⁷ Indeed, it is doubtful whether private parties would voluntarily place conservation restrictions on their land in significant numbers if public access was mandated. Under the Massachusetts law, a grantor is allowed to part with development rights, thereby relieving developmental pressures, while retaining his exclusive right to possess the land.⁸⁸ The legislature has determined that the public as a whole will benefit in the long run from the preservation of open spaces even without public access to the restricted lands. This public benefit should be determinative in affirmatively answering the question of whether such conservation restrictions accepted by a governmental body acting pursuant to its statutory power will qualify as a deductible item within the ambit of the charitable contributions provisions of the Code. But a broad interpretation of the statute will be necessary.⁸⁹

Further concern has been expressed over the use of the term "easement" in describing the open space restrictions that may qualify for deductibility. Such concern necessarily arises from traditional connotations of the term and the technical rules applied to its use;⁹⁰ and also from the fact that conservation restrictions are basically use restrictions (*i.e.*, they restrict the uses to which the land can be put). As such, conservation restrictions are most comparable to "negative easements." However, as has been noted previously,⁹¹ the Tax Regulation⁹² does specifically state that certain restrictions will qualify for deductibility, notwithstanding the fact that they also restrict the use of the land.

The Regulations also state that merely because an interest may be defeated by the performance of a particular act or the happening of a particular event, the gift should not be disallowed where on "the date of the gift it appears that the possibility that such act or event will occur is so remote as to be negligible."⁹³ This provision will encompass certain types of reversion grants,⁹⁴ and presumably would include restrictions that contain taking clauses.⁹⁵

The language in Regulation 1.170 A-7(b)(1)(ii) that the interest granted be "in perpetuity" raises other problems, most notably those relating to marketable title acts. However, the Massachusetts

statute states that conservation restrictions, if given in perpetuity, will remain in effect in perpetuity provided they are indexed on a public restriction tract index.⁹⁶

A charitable contribution of a conservation restriction, like all charitable contributions, must be given with the requisite donative intent. It has been held not to be a charitable contribution where a taxpayer had dedicated a strip of land for use as a public road in order to get a concession from a zoning board.⁹⁷ Also, since a "gift" is a voluntary transfer of property by the owner to another without consideration, where the grant "proceeds primarily from the incentive of anticipated benefit to the [grantor] beyond the satisfaction which flows from the performance of the generous act, it is not a gift."⁹⁸ Thus, a conservation restriction given *solely* for the purpose of gaining a reduction in taxes may be found not to have been given with the required charitable intent. Such intent, however, will be a question of fact. A gift of a conservation restriction given "primarily" with a charitable intent (a gift given with a mixed motivation) would seem to qualify.⁹⁹

IV. FEDERAL INCOME TAX CONSEQUENCES OF THE SALE OF A CONSERVATION RESTRICTION

The classification and treatment for income tax purposes of the proceeds realized from the sale of an easement may differ according to the nature and effect of the easement itself. As this area is covered exhaustively in other articles¹⁰⁰ it will be only briefly noted here.

When a conservation easement is sold, the threshold question becomes whether the income from such sale will be treated as ordinary income or as capital gain. This is important because of the different ways these two classes of income are treated under the income tax laws. If a loss occurs from the sale it may be preferable to treat such loss as an ordinary, rather than capital, loss because deductions for capital loss usually are limited to the amount of capital gain realized in the same taxable year. Also, since ordinary income is usually taxed at a higher rate than capital gains, a greater tax benefit would be realized if the deduction is made from ordinary income. Where a gain is realized, it is better to treat it as a capital gain because of the alternative tax placed on the excess of long term capital gains over short term capital losses.¹⁰¹

Sales of capital assets are accorded capital gains treatment.¹⁰² In determining whether the sale of an easement should be accorded such treatment two conditions must be present: the transaction

must be (1) a "sale", (2) of "property."¹⁰³ Where perpetual easements are involved¹⁰⁴ the transaction is held to be a sale.¹⁰⁵ If the easement sold is not perpetual, it is treated as a lease rather than as a sale, and the income realized therefrom is treated as ordinary income rather than capital gain.¹⁰⁶

There has been some dispute as to whether the distinction between affirmative easements and negative easements will be determinative in deciding whether an easement is "property" in the capital gains sense.¹⁰⁷ The case for affirmative easements being "property" seems to be clear. With regard to negative easements (the type of interest in land with which conservation restrictions are most comparable), the problems are more complex. However, restrictive covenants have been given capital gains treatment.¹⁰⁸ Since conservation restrictions are a form of restrictive covenants, the argument that conservation restrictions are "property" and hence capital assets, is persuasive.¹⁰⁹

In computing whether a gain or a loss has been realized from the sale of a conservation easement, it is important to note that if the easement is such that it deprives the owner of the restricted land of nearly all of his beneficial interest therein, so that he in effect merely retains bare legal title to the land, the sale of the easement will be considered a sale of the fee. Such was the case in *Scales v. Commissioner*,¹¹⁰ where the vendor sold an easement over a certain portion of his property allowing it to be used as flood plain land. As a result of the easement the land remained flooded ten months of the year and was useless for cultivation or grazing purposes. The amount received by the landowner for the restriction was less than the actual cost basis of his property.¹¹¹ Consequently, the amount realized from the sale was not included in his income for the year. Instead he was allowed to deduct from income the difference between the cost basis and the amount received, as a capital loss.

Such computation is more difficult where the sale of the easement allows the vendor to retain at least some beneficial use of his property and hence does not qualify as a "sale" of the fee. Since the purpose of a conservation easement is primarily to allow the landowner to retain certain benefits and enjoyment from his land while concurrently preserving open spaces, such easements undoubtedly fall into this category. The problem is one of allocating the basis of the property as a whole between the rights conveyed and the rights withheld by the fee owner.¹¹² What must be determined is the *basis of the easement rights conveyed* so that this value may be deducted from the actual proceeds of the easement sale in order to determine what gain or loss has occurred.

A discussion of one of the methods proposed¹¹³ to compute this basis value, the "ratio method," will be helpful in understanding the problem. For example, suppose that a tract of land had been bought for \$4000. Several years later the land's fair market value has risen to \$10,000 and an easement is sold burdening the land (for whatever purpose) for \$2000. The ratio of the current value of the easement to the current value of the full fee is: $\frac{2,000}{10,000} = 1/5$.

Applying this ratio to the basis of the full fee, we arrive at a basis value for the easement rights conveyed: $1/5 \times \$4,000 = \800 . Thus there will be capital gain of $\$2000 - \$800 = \$1200$. The mechanics of this approach are simple; but the practicality of it is questionable, especially where the value of the rights given by the easement has increased or decreased disproportionately with the value of the full fee (*i.e.*, where the value of easement rights has increased at a slower rate than the value of the full fee). This method and others are useful subject to certain noted qualifications.¹¹⁴ Where determination of the basis of the easement rights conveyed will be highly speculative, courts may still allow the grantor to treat the proceeds as capital gain by allowing the amount received from the sale of the easement to be subtracted from the basis of the full fee. This adjusted basis will be utilized in determining capital gain or loss when the land (the remaining rights to the fee) is later sold. In such a case, where a sale of an easement produces income in excess of the basis of the property, the excess will immediately be treated as capital gain and the adjusted basis of the land will become zero.¹¹⁵ For an analysis of this topic in greater depth the reader should consult the authorities cited.¹¹⁶

V. REAL ESTATE TAX REASSESSMENT

Another motivating force for the sale or gift of a conservation restriction is the expectation that the grantor, having given up certain rights in his property, will be entitled to a downward revaluation of the restricted property and a subsequent decrease in real estate taxes.

Open space programs have attempted "to prevent the forced conversion of such open space to more intensive uses as a result of *economic pressures*"¹¹⁷ such as rising real estate taxes and appealing offers from developers to sell for subdivision. An efficient way to ease such pressures is to relieve the beleaguered property owner of the burden of rising real estate taxes. How can this be effectuated?

Under Massachusetts law, assessors are obligated to make a fair cash valuation of all property, real and personal, subject to taxa-

tion.¹¹⁸ This standard of "fair cash value" has been held to mean "fair market value" - the price that a willing buyer would pay to a willing seller.¹¹⁹ It means the highest price a normal purchaser under no compulsion is willing to pay at the time, and not exceeding the amount that the seller could obtain after a reasonable effort.¹²⁰ In determining this value, assessors must look to the value of the property for all uses to which it could reasonably be put,¹²¹ the best and "highest use"¹²² ordinarily being the basis for tax allocation.

Thus, it must be ascertained how a conservation restriction, when given or sold to a municipality or charitable corporation, or when condemned, will affect the fair cash value of the property which it encumbers. In the case of *Lodge v. Inhabitants of Swampscott*,¹²³ the court found that a use restriction (prohibiting construction of buildings) in a deed devising certain lands acted to diminish the fair cash value of the lands, and held that the land should be assessed for taxation at that diminished value. The court observed that "[t]o assess this property without regard to the restriction would . . . be to assess it for an amount in excess of its fair cash value and in violation of the statute."¹²⁴ Therefore, as long as the use and enjoyment of the land are affected by the restriction and the restriction can be found to diminish the land's fair cash value, a downward reassessment will be forthcoming. That most conservation restrictions prohibiting development of land will be covered by this ruling is clear.

Evidence that other types of restrictions, including rights of way for hiking or watercourses and use of land for flood plain purposes, will also fall within the scope of this principle can be found in court recognition of decreased land value in condemnation of easement cases from various jurisdictions. The courts have applied the "before and after" test in such cases in determining the amount of damages to be paid to landowners whose property has been burdened by an easement. Where easements for flowage¹²⁵ or a right of way for gas and oil pipe lines¹²⁶ were taken, the landowners were entitled to recover the difference between the fair market value of the land before and after the taking. In certain instances, but very rarely, property that is encumbered through condemnation to such an extent that exclusive control is in the public, or the potential use of which is effectively extinguished, may be exempt from taxation altogether even though the owner retains legal title to the fee.¹²⁷

In theory, therefore, downward reassessment should be a substantial boon to a conservation restriction program. However, practically speaking, application of this policy may be problematic in

light of certain administrative difficulties, and the political reality that local government finances are heavily dependent on local property taxes.

A. Administrative Problems of Downward Reassessment

Massachusetts law specifically provides for separate assessment of any parcel of land upon which a conservation restriction has been imposed. Assessors are to reassess any such restricted land on or about January 1st of the year following imposition of the restriction.¹²⁸ Thus, the reassessment is mandatory, and armed with this authority the tax assessor can allow the taxpayer an immediate realization of the benefit of his agreement to burden his land. An owner of restricted land need not wait for a general reassessment of the area as would ordinarily be the case.

Property tax assessors, however, are given no guidelines to follow in determining the amount of diminution in fair cash value realized when a restriction is placed on the land. Accordingly, haphazard and inconsistent valuations are likely, absent the discovery of workable standards to fill this void. Fortunately, the area is not without precedent. In 1973, the New York Court of Claims held that the taking of a scenic easement restricting the use of the land to farming caused the fee to diminish in value by 90 percent.¹²⁹ In making this determination the court analogized the scenic easement involved to powerline easements previously given such treatment.¹³⁰

Thus far, treatment of conservation restrictions by tax assessors in Massachusetts has varied widely, ranging from 13 percent to 95 percent diminution.¹³¹ Significant variation may be justified because of substantial differences in circumstances surrounding the restricted land in question. Where development is prohibited on land near expanding or already existing residential communities it is difficult to see how the land can have greater than nominal value in a "fair market". Such was found to be the case in one community on the outskirts of Boston, but the appraiser was reluctant to allow a reduction of more than 75 percent of value.¹³² In light of the New York Court of Claims decision discussed above and the realities of the open market, a reduction in the range of 75-90 percent is certainly justified by the "fair cash value" theory.

In the typical case, assessors will resort to comparable sales of similar lands in similar areas as their yardstick for assessing land. This effort will be unavailing, however, where conservation restrictions are concerned, because such restrictions are usually transferred in perpetuity to towns, charitable organizations or trusts who

generally have no desire to part with them even if sale on the open market were possible. Thus, valuation guidelines are necessary but unavailable.

Common sense standards, however, are discoverable. Downward reassessment should vary proportionately with developmental pressure on land in the area. Presumably, this pressure will decrease as the distance from the urban area increases. Existing zoning requirements, although frequently subject to variance, should also be considered by the assessor when reassessing restricted land. Certainly, a promise not to build on a one-half acre plot where zoning requirements prohibit building on anything less than a full acre, will be of less consequence than a similar restriction in an area where building is permitted on such a plot.¹³³

One of the most thorough reassessment policies established to date in Massachusetts is used by the town of Barnstable on Cape Cod.¹³⁴ There a percentage formula is used as a guideline for reassessment. The town will accept no restriction of less than 15 years duration, and will exclude the first one acre of land upon which buildings or residences stand from reassessment. The remaining land is reassessed at a percentage of its current valuation.

For example, land over which restrictions are placed in perpetuity is to be revalued at 15 percent of current valuation. Land restricted for 15 years is to be revalued at 60 percent of current valuation. It is also possible in certain areas for a conservation restriction to merely cause a freezing of current valuation, as where a community has a policy of assessing these lands at "use values" rather than at "highest and best use value."¹³⁵

B. Policy Problems of Downward Reassessment

One commentator has pointed out that "the property tax remains the most important source of revenue for local government."¹³⁶ Thus, a primary concern of every municipality in accepting a restriction and downwardly reassessing property will be the preservation of the town treasury. Will the "cost" of a conservation restriction program in terms of lost revenue be justified by the benefits of open space preservation?

An incident in Maryland indicates the seriousness of this concern. That state has instituted a program allowing for assessment of farmland at use value. Over a six year period the owners of one 904-acre track of land saved over \$348,000 in real estate taxes.¹³⁷ However, to those who would attack the conservation restriction program as one that will inevitably exhaust city funds, Professor Whyte re-

sponds that in a well thought out, well administered open space program, only a relatively small portion of the total land area under consideration need be restricted. Accordingly, the goal of the program should be "to secure the rights for the key areas which, though only a fraction of the total, tend to set the character of the whole."¹³⁸ He goes on to state even more emphatically that:

One has reason to hope that study will demonstrate that an intelligently planned open space program will not hurt the community's tax base. It is true that the landowners who have given up their rights should not be taxed at the going market value for surrounding land available for development, but let it be noted that, if they don't pay the higher rate, it is because they will not saddle the community with the demand for new services [e.g., schools, roads, sewers]. . . . Nor is land 'frozen' at its current value simply because it cannot be developed; as noted earlier, it seems highly likely that much of the land in such areas will greatly increase in value because of the supply and demand situation for the remaining 'estate' land.¹³⁹

Professor Whyte supports his argument by pointing to the extra costs necessary to provide municipal services for the "kind of hit or miss" development that takes place in many areas today. He realizes that the program will raise many financial questions, but also believes that these are not insurmountable.¹⁴⁰

Another consideration antagonistic to the assertion that the costs of a conservation restriction program to local government outweigh the benefits has been referred to as the "betterment theory." This theory has been articulated in a variety of instances where lands, or restrictions on land, have been sought for public purposes. *Townsend v. State*¹⁴¹ is an interesting case in this area. That action involved a landowner's suit for compensation after certain parcels of land were taken for highway construction. Using the "before and after" approach, the court allowed a deduction from the landowner's damages equal to the amount by which he had benefitted from the improvement.¹⁴² Likewise, special assessments may be allocable to landowners who benefit from a nearby improvement since the resulting benefit is reflected in property values (*i.e.*, the landowners are merely paying for what they receive).¹⁴³ Arguably, if not actually, proximity of residential and other areas to areas burdened with conservation restrictions will bestow a benefit which may be reflected in property values and resultant taxes.¹⁴⁴

Moreover, the betterment theory has been an important factor in land assessment for many years. A study made on the impact of park areas on adjacent lands notes that assessed values of such

lands rose by an amount fourteen times the average percentage increase of other land in the city over the same period of time.¹⁴⁵ Although such an overwhelming result is unlikely today, the study is a vivid illustration of the theory's validity.

Since open space can be a *private* as well as a *public* benefit, assessors may be justified in raising the assessed value of lands adjacent to properties encumbered by conservation restrictions on a betterment theory rationale. This principle should not, however, be arbitrarily applied in all cases. Individual circumstances such as the nature of restriction imposed, the area generally, and whether a benefit can be shown accruing to particular landowners in addition to the general public must also be considered.

Another potential solution to the local revenue problem may be provided by devices known as rollback taxes and conveyance fees. Section 32 of the Massachusetts law provides that a restriction may be released for such consideration as the holder may determine. Some provision, either in the agreement creating the restriction or specifically in the statute, is necessary in order to insure that open space uses will actually be maintained in exchange for preferential tax treatment, especially where a restriction is not given in perpetuity. Although downward reassessment certainly makes holding of the land easier, it also makes selling more appetizing because the profit margin at sale is increased.¹⁴⁶ Many statutes allowing for present use value assessment on certain classes of land provide for rollback taxes or conveyance fees as types of penalty provisions where the use restriction is discontinued or violated.¹⁴⁷

The Massachusetts Agricultural and Horticultural Land Act,¹⁴⁸ which provides for use value assessment of farm lands, is fairly typical. The Act provides that whenever land valued and assessed pursuant to its provisions is sold for some other use within a prescribed period,¹⁴⁹ it will be subject to a conveyance tax. The amount of the conveyance tax will be a varying percentage of the sale price: ten percent if sold within the first year of ownership, nine percent if sold within the second and so on.¹⁵⁰ The Act further provides that where the qualifying use of the land under the Act is changed, rollback taxes will be computed for the tax year in which the use is changed and for the preceding four years.¹⁵¹ The rollback taxes or conveyance fee will be paid, whichever is greater. The rollback tax for a one year period is equal to the difference in the use value tax and the tax that would be assessed were the assessment based upon potential use.¹⁵²

It remains to be seen whether such taxes will be a sufficient deterrent to prevent abuse of the law by speculators.¹⁵³ Even so, such a

deferred tax program allows the owner to pay this tax out of his capital gain upon sale (with or without interest) making the holding of property easier¹⁵⁴ in the face of rising tax prices and other pressures, while at the same time combatting speculation and potential abuse of the preferential tax treatment. A similar provision should be inserted in the Massachusetts Conservation Restriction Law or in the agreement recognizing the restriction.

The conveyance fee is the suggested procedure in Barnstable. There, a "conveyance penalty percentage" based upon a percentage formula has been adopted to determine the amount to be charged the grantor in case a restriction is released. The applicable percentage is applied to the "current full and fair market value of the subject land, unencumbered by any restriction." The percentage used depends upon the original duration of the restriction and the number of years that have passed since the effective date of the restriction. For example, a 40 percent conveyance penalty fee is applied to a restriction given for 30 years for which release is sought prior to the expiration of 15 years from its effective date. For release after 15 years have elapsed, a 35 percent penalty fee is imposed.¹⁵⁵

Conversely, to safeguard the conservation restriction grantor where land to which the restriction applies is condemned for public use, the restriction should terminate and immediately revert to the grantor so as to insure full compensation of the landowner. The restriction agreement itself can cover this possibility.¹⁵⁶ In lieu of rollback taxes and conveyance fees, and especially where restrictions are given for shorter terms, a graduated tax should be placed on the land, recognizing the fact that as the time for termination of the restriction approaches the land becomes more valuable.

VI. A COMPARISON WITH OTHER LAND USE CONTROL DEVICES

A. *Zoning and the Conservation Restriction*

Use of the conservation restriction as a supplemental tool in promoting orderly land development can yield many benefits not otherwise realizable. Implementation of a zoning plan, for instance, entails no direct public expenditure and little in administrative costs.¹⁵⁷ However, its utility is limited and has generally proved inadequate as a method of preserving open spaces.¹⁵⁸ Where a zoning ordinance purports to preserve open spaces by greatly restricting the uses to which the land can be put, courts will declare it void¹⁵⁹ as being in reality a taking of the land for a public purpose without just compensation—a Constitutional violation.¹⁶⁰ On the other hand, if the landowner cannot prove a taking he may go uncompensated for

the interference with his right to use his land.¹⁶¹ As Professor Whyte points out, it is more equitable to treat open space preservation as a benefit to the public for which the public, not private parties, must pay.¹⁶² Moreover, gross abuse of the zoning variance procedure often defeats the essential purpose of the zoning plan.

Minimum lot zoning has gained popularity as a method of preserving open spaces,¹⁶³ but it too is defective in that "it tends to accentuate rather than diminish scatteration"¹⁶⁴ (haphazard, leap-frog development). Conservation restrictions and minimum lot zoning plans are, however, similar in effect in that both methods cause portions of land to become undevelopable, thereby arresting development altogether or forcing it into other areas. In addition to the possibility of accentuating "scatteration," such developmental restrictions can cause serious adverse social effects:

[I]n-city migration of the rural poor with an out-city migration of high- and moderate-income people together with business and industry has resulted in social polarization, inequity in job, educational and recreational opportunities and . . . urban crisis. Lack of job and housing opportunities in the suburbs for the unskilled poor and minorities reinforce the polarization. Land use controls, specifically exclusionary zoning, have helped to direct the division of society into ghettos and moderately well-off suburbs.¹⁶⁵

In *Fairfax County v. Carper*,¹⁶⁶ the court held that where the practical effect of an amendment to an existing zoning ordinance increasing minimum lot size was to exclude people in low income brackets from the area, it would be struck down as serving private rather than public interests. "Such an intentional and exclusionary purpose would bear no relation to the health, safety, morals, prosperity and general welfare."¹⁶⁷ The decision in the *Fairfax County* case has led one writer to conclude that minimum lot zoning cannot be relied upon in the future.¹⁶⁸ Whether, owing to improper use, the purpose and utility of conservation restrictions will one day be subjected to similar skepticism and disdain, one can only speculate. Also, since financially sound suburban communities, already benefitting from abundant open space, are most likely to make substantial use of the law, the legislature must be alert and willing to intervene should the beneficial effects of an open space preservation program be offset by the choking effect on the urban poor who do not have the resources available to meet the necessarily increasing costs¹⁶⁹ of escaping to the suburbs.

The use of conservation restrictions as a tool in the bargaining process of developers and local government when developers seek

permission to build in a particular area will have effects similar to those found in "incentive zoning" procedures. Such procedures are not alien to Massachusetts law. In *Sylvania Electric Products, Inc., v. City of Newton*¹⁷⁰ an agreement between the town and the landowner, whereby the landowner agreed to impose certain restrictions on his property and to deed a certain portion of his property to the town in return for a zoning amendment in his favor, was upheld by the court as a valid exercise of zoning power. Similarly, when a developer applies to a town for a special permit to construct housing or otherwise develop the land, the town has the power to issue a conditional permit requiring, for example, that the petitioner "grant to the [t]own . . . a conservation restriction in which [he] undertakes to excavate a sump in Swamp Brook upstream of Sudbury Road, to excavate the ditches and that portion of Swamp Brook abutting the site and to clean and keep free of silt the culvert beneath Sudbury Road."¹⁷¹ The court which upheld this conditional permit noted that the standards to be applied in determining whether comprehensive permits should be issued are primarily those of reasonableness and consistency with local needs. From a developer's point of view, granting a conservation restriction to a town as part of his development scheme may be helpful in persuading the town that the permit is consistent with "local needs." In addition, a restriction on land which creates buffer zones in and around a development will make the development more attractive and allow for higher prices on property therein.

B. Eminent Domain and TDR's: The Old and the New

Eminent domain is effective as a land use control device because it allows the government to take property for public purposes upon payment of just compensation. However, since costs can be prohibitive,¹⁷² any long range planning effort must rely on something other than the taking power alone to achieve its goal. The conservation restriction complements this power well. (1) Since less than a full fee simple is acquired when conservation restrictions are sold or taken by eminent domain, costs are reduced and the financial viability of eminent domain as a tool of open space preservation is augmented. (2) Owing to various pecuniary and non-pecuniary incentives, conservation restrictions will most often be created by consensual agreement, thus avoiding any ill feelings that may arise when a landowner is deprived of his land. Although creation of conservation restrictions by consensual agreement does not allow for the same degree of control over the location of restricted land as does

eminent domain, the utility of this technique cannot be denied, especially since many grantors are willing to bestow conservation restrictions on local government gratuitously.

Another comparatively new and relatively untested land use control device meriting attention here is the "transfer of development rights" method (TDR).¹⁷³ At optimum efficiency, this device, like zoning, requires little expenditure of public funds for implementation other than administrative costs, and is thus less costly than the conservation restriction method. The primary goal of a TDR program is to "create a market for development rights in which owners of developable land must buy development rights from owners of preserved open space land as a prerequisite for development."¹⁷⁴ The municipality is in effect the middleman. It merely allocates development rights equitably among parcels of land. Owners of developable land must acquire development rights from owners of undevelopable land in requisite quantity before the proposed development can take place. If the market in TDR's functions smoothly, the municipality will bear little of the costs of the program.

According to Professor Rose,¹⁷⁵ the first step for each local government in establishing a TDR program is to prepare a land use plan designating which lands are to be preserved as open space, which are to be developable, and the extent of allowable development. Next, that number of development rights necessary to allow a district to be developed to the full extent deemed desirable under the plan are distributed to that district.

Owners of land designated as open space will receive these rights (in the form of certificates) on a percentage basis. When developers desire to build upon developable land, they must purchase from owners of open space land that number of development rights necessary to implement the proposed development. Thus, open land will be preserved and the owners of the land will be compensated without any costs (except possible administrative costs) to the government.

Forms of this technique have been used in New York¹⁷⁶ and Chicago.¹⁷⁷ A short illustration of the New York plan will be helpful in understanding the mechanics of the technique.¹⁷⁸ The New York City system is concerned with the preservation of historical landmarks. The pressures on those owning landmarks to demolish them and build modern high rises are the same as those put on owners of open space land to sell to the developer for subdivision. The rationale behind the plan is that landmarks usually have authorized but unused floor area.¹⁷⁹ If a developer wishes to build in an area where

more intensive land use is allowed, he must purchase any additional floor area he desires from the owner of the historical landmark. As a result, the landmark owner is compensated for not developing and the cost to the government is minimal. Note that in this plan tax losses on landmark property are offset by increased taxes on lots receiving transfer of development rights.

CONCLUSION

A craftsman must use all of the tools at his disposal in order to create his masterpiece. So must it be with those who seek to create and effectuate a long range, well balanced community development plan. The "conservation restriction" as created by Massachusetts law is an invaluable addition to the growing arsenal of land use control devices. The legislature has done its homework and drafted wisely, eliminating enforcement problems before they arise. Also, due to the substantial real estate and income tax incentives for private sale and donation of conservation restrictions to public and charitable bodies, the legislature has created an appealing incentive for voluntary, individual landowner involvement in an open space preservation program. As these advantages become known, use of this device should increase. But the conservation restriction concept must be viewed with the caveat that it may prove to be primarily a tool of the well-to-do community. A close scrutiny and continuing reevaluation of the program by the legislature is necessary to insure that the benefits of open space are not realized at the expense of a significant decrease in the mobility of lower and moderate income families. The resulting "polarization" and inequities may be too great a price to pay for the preservation of open spaces.¹⁸⁰



FOOTNOTES

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¹ CAL. GOV'T CODE ch. 12, § 6950 (West 1966); MASS. GEN. LAWS ANN. ch. 184, §§ 31-33 (Supp. 1974); N. J. STAT. ANN. § 13:8A-30 (Supp. 1973).

² Whyte, *Securing Open Space for Urban America: Conservation Easements*, URBAN LAND INSTITUTE TECH. BULL. No. 36 (1959) [hereinafter cited as Whyte].

³ N. J. STAT. ANN. 13:8A-30(b) (Supp. 1973).

⁴ *Id.* 13:8A-20 (a)-(d) (Supp. 1973).

⁵ MASS. GEN. LAWS ANN. ch. 184, § 32 (Supp. 1974).

⁶ *Id.* § 31.

⁷ *Id.* §§ 31-33.

⁸ *Id.* §§ 26-30.

⁹ *Id.* § 26(c).

¹⁰ Mass. Jud. Council, 36th Report at 81 (1960), as cited in *La-bounty v. Vickers*, 352 Mass. 337, 225 N.E.2d 333, 341 (1967).

¹¹ Note, *The Massachusetts Marketable Title Act*, 44 B.U.L. REV. 201, 202 (1964).

¹² MASS. GEN. LAWS ANN. ch. 184, §§ 27, 28 (Supp. 1974); *Id.* at 204.

¹³ “(a) [U]nless the person seeking enforcement (1) is a party to the instrument imposing the restriction and it is stated to be for his benefit or is entitled to such benefit as a successor to such party, or (2) is an owner of an interest in benefitted land which either adjoins the subject parcel at the time enforcement is sought or is described in the instrument imposing the restriction and is stated therein to be benefitted. . . .” MASS. GEN. LAWS ANN. ch. 184, § 27 (Supp. 1974).

¹⁴ “5. Restrictions may be deemed imposed as part of a common scheme if imposed of record on various parcels in such manner that each owner is entitled to enforce the restrictions against the other parcels, although there may be variations in the restrictions among the various parcels.” *Id.* § 26.

¹⁵ *Id.* § 27(b).

¹⁶ *Id.*

¹⁷ *Id.* § 28.

¹⁸ Opinion of the Justices, 274 N.E.2d 336, 340 (1971).

¹⁹ “[E]xcept in appropriate cases by award of money damages. . . .”

²⁰ *Walker v. Sanderson*, 348 Mass. 409, 204 N.E.2d 108 (1965).

²¹ *Compare Gulf Oil Corp. v. Fall River Housing Auth.*, 1974 Mass. Adv. Sh. 24, 306 N.E.2d 257 (1974), *with Shell Oil Co. v. Henry Ouellete and Sons Co.*, 352 Mass. 725, 227 N.E.2d 509 (1967). The court found in the former case that the intent of a restriction having an anticompetitive effect was not to benefit a particular landowner, but rather to assure orderly development of the area. The restriction was upheld. A similar restriction in the latter case was not upheld because the court found that it was intended to benefit a particular landowner and therefore did not “run with the land” as required.

²² *Harrod v. Rigelhaupt*, 298 N.E.2d 872 (1973). This case illustrates the potential difficulty of meeting such a burden.

²³ *Id.* at 877-79.

²⁴ Brenneman, *Techniques for Controlling the Surroundings of Historic Sites*, 36 L. & CONTEMP. PROB. 416, 421-22 (1971).

²⁵ Act of August 11, 1969, ch. 666, [1969] Mass. Acts & Resolves 537.

²⁶ MASS. GEN. LAWS ANN. ch. 184, § 26 (Supp. 1974).

²⁷ *Id.* § 32.

²⁸ *Id.*

²⁹ N. J. STAT. ANN. 13:8A-30 (Supp. 1973).

³⁰ "[O]r in any order of taking. . . ." MASS. GEN. LAWS ANN. ch. 184, § 31 (Supp. 1974).

³¹ Krasnowiecki and Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. PA. L. REV. 179, 192 (1961) [hereinafter cited as Krasnowiecki and Paul].

³² *Id.*

³³ MASS. GEN. LAWS ANN. ch. 184, § 31 (Supp. 1974).

³⁴ *Id.*

³⁵ MASS. GEN. LAWS ANN. ch. 184, § 31(g) (Supp. 1974).

³⁶ Krasnowiecki and Paul, *supra* n. 31, at 192-94; Whyte, *supra* n.2, at 44-45.

³⁷ Reference will be made to existing restrictions on file at the Department of Natural Resources, 100 Cambridge St., Boston, Mass. 02202, according to their file number. The file number indicates the town in which the restriction is found, with the restrictions numbered chronologically. The restrictions referred to here are Dartmouth #3, Plainfield #1.

³⁸ Chilmark #1.

³⁹ Duxbury #3.

⁴⁰ Dennis #1. The signs are only of dimension 2'x3.'

⁴¹ Eastham #1.

⁴² Sherborn #3. For an opinion that this may be going too far, see Whyte, *supra* n. 2, at 44.

⁴³ MASS. GEN. LAWS ANN. ch. 184, § 31 (Supp. 1974).

⁴⁴ See text at n. 48 *infra*.

⁴⁵ See *supra*, n. 13, for discussion of § 27.

⁴⁶ Whyte, *supra* n. 2, at 44. Examples cited by Prof. Whyte include many "prohibitions" and "restrictions" against certain acts. These are similar to those found in the Massachusetts law. See text at n. 34, *supra*.

⁴⁷ Krasnowiecki and Paul, *supra* n. 36, at 194.

⁴⁸ 2 AMERICAN LAW OF PROPERTY § 8.2 as cited in Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574, 613 (1972) [hereinafter cited as Costonis].

⁴⁹ *Boatman v. Lasley*, 23 Ohio St. 614 (1873).

⁵⁰ Massachusetts conservation restrictions are legislatively declared to be interests in land. MASS. GEN. LAWS ANN. ch. 184, § 32 (Supp. 1974).

⁵¹ *Boatman v. Lasley*, 23 Ohio St. 614 (1873).

⁵² *Id.*

⁵³ Costonis, *supra* n. 48, at 614 and 614, n. 149.

⁵⁴ WIS. STATS. ANN. tit. 21, ch. 326, § 293 (1957).

⁵⁵ Some restrictions provide that if the grantee is unable or unwilling to continue to hold the restriction, it must use its best efforts to transfer it to another qualified holder. *See* Dennis #1, Chilmark #2, Weston #1. "Privity of estate" is another complex and elusive common law property requirement.

⁵⁶ Costonis, *supra* n. 48, at 617.

⁵⁷ Sudbury #1.

⁵⁸ "[V]ariations can make a sieve out of a community plan. . . ." Whyte, *supra* n. 2, at 45.

⁵⁹ *See* section on real estate taxes, text at nn. 145-56 *infra*.

⁶⁰ "[T]he governmental body acquiring, releasing or approving shall take into consideration the public interest in such conservation or preservation, and any national, state, regional and local program in furtherance thereof, and also any public state, regional or local comprehensive land use or development plan affecting the land, and any known proposal by a governmental body for use of the land." MASS. GEN. LAWS ANN. ch. 184, § 32 (Supp. 1974).

⁶¹ INT. REV. CODE OF 1954, § 170(c)(1), (2)(B).

⁶² *See* text at n. 26, *supra*.

⁶³ Examples of "charitable corporations or trusts" holding restrictions in Massachusetts include the Duxbury Rural and Historical Society, the Essex Greenbelt Association, the Weston Forest and Trail Association, and the Westport Land Conservation Trust.

⁶⁴ INT. REV. CODE OF 1954, § 170(a)(1). Much guidance in developing this section was gained through use of the Massachusetts Conservation Commission Handbook published by the Massachusetts Association of Conservation Commissions, 506 Statler Office Building, Park Square, Boston, Mass. 02116.

⁶⁵ *Id.* § 170(b). A person making a gift of a conservation restriction must file a gift tax return when the value of the gift or gifts to one donee is greater than \$3000. J. Hillsberg, *THE FEDERAL INCOME, ESTATE, AND GIFT TAX CONSEQUENCES OF THE SALE OR GIFT OF A CONSERVATION EASEMENT*, at 32 (1970) (published by Institute for Environmental Affairs, University of Pennsylvania) [hereinafter cited as Hillsberg].

⁶⁶ “[C]ontribution base’ means adjusted gross income. . . .”
INT. REV. CODE OF 1954, § 170(b)(1)(F).

⁶⁷ *Id.* § 170(b)(1)(A).

⁶⁸ *Id.* § 170(b)(1)(D)(iv).

⁶⁹ See section on Income Tax Consequences of the Sale of a Conservation Restriction, text at nn. 100-09 *infra*.

⁷⁰ INT. REV. CODE OF 1954, § 170(b)(1)(D)(i).

⁷¹ *Id.* § 170(b)(1)(D)(ii).

⁷² *Id.* § 170(b)(1)(D)(iii).

⁷³ Massachusetts Conservation Commission Handbook.

⁷⁴ INT. REV. CODE OF 1954, § 170(f).

⁷⁵ *Id.* §§ 170(f)(3)(B)(ii), 2522(c)(2).

⁷⁶ TREAS. REG. § 1.170A-7(b)(1)(i) (1974). For another example of a gift of this type of interest see REV. RUL. 419, 1972-36 Cum. Bull. 5.

⁷⁷ TREAS. REG. 1.170 A-7(b)(1)(ii) (1974).

⁷⁸ Refer to text of Massachusetts Conservation Restriction Law, text at n. 34, *supra*.

⁷⁹ Conservation Law Foundation text of seminar notes. The Foundation is a private non-profit organization presently located at 506 Statler Office Building, Park Square, Boston, MA 02116.

⁸⁰ REV. RUL. 205, 1964-30 Cum. Bull. 6.

⁸¹ *Id.* at 7; TREAS. REG. 1.170-1(c)(1) (1974).

⁸² In most cases the “basis” of property is its cost. INT. REV. CODE OF 1954, § 1012.

⁸³ REV. RUL. 205, 1964-30 Cum. Bull. 6, 7.

⁸⁴ See n. 79 *supra*.

⁸⁵ Dartmouth #1. Gloucester #1 allows access between June 15 and September 15 to no more than 20 persons at one time, all of whom must hold cards given by the grantee. Wellesley #1 allows access to members of the Conservation Council for purposes of nature study only.

⁸⁶ Yarmouth #2, Lexington #2. Some restrictions allow public access as long as the grantee enforces reasonable regulations to prevent injury to persons or damage to property. See Eastham #3, West Tisbury #2.

⁸⁷ One restriction is on land with exclusive homes, locked gates, and private roads. There is no public benefit other than open space land, not even a view. See Chilmark #1.

⁸⁸ One grantor refused public access because he did not want to be burdened with cleaning up the area. See Topsfield #1.

⁸⁹ One restriction, given before the Conservation Restriction Law,

was an easement appurtenant. However, no federal tax problems were encountered. This may be an indication of a propensity toward just such a broad interpretation. See notes on Topsfield #2, 3, 4 in Conservation Law Foundation file.

⁹⁰ See section on Enforceability, text at nn. 45-56 *supra*. Some jurisdictions even restrict easements to special categories. See Brenneman, *supra* n. 24, at 418.

⁹¹ See *supra* n. 78.

⁹² TREAS. REG. § 1.170A-7(b)(1)(ii) (1974).

⁹³ *Id.* § 1.170A-7(a)(3).

⁹⁴ An example found in the Regulations is (1) land conveyed to the city "as long as it is used for a park" where the city at the time of the gift does not plan to use it for anything else (*i.e.*, the chance of a different use is remote). *Id.* § 1.170A-1(e).

⁹⁵ See text at n. 156 *infra*.

⁹⁶ MASS. GEN. LAWS ANN. ch. 184, § 33 (Supp. 1974). Refer also to discussion of the Massachusetts Marketable Title Act, text at nn. 8-23 *supra*.

⁹⁷ *Stubbs v. United States*, 428 F.2d 885 (1970).

⁹⁸ *Harold DeJong*, 36 T.C. 896, 899 (1961), *aff'd* 309 F.2d 373 (9th Cir. 1962).

⁹⁹ It is interesting to note that the town of Barnstable gives its Board of Assessors authority to disallow any reduction in assessed taxes where the restriction has been given solely to evade payment of full real estate taxes.

¹⁰⁰ Hillsberg, *supra* n. 65; Comment, *Progress and Problems in Wisconsin's Scenic and Conservation Easement Program*, 1965 Wis. L. REV. 352 [hereinafter cited as Wisconsin Conservation Easements.]

¹⁰¹ Hillsberg, *supra* n. 65, at 2-3.

¹⁰² INT. REV. CODE OF 1954, § 1221 as cited in Hillsberg, *supra* n. 65, at 4.

¹⁰³ Wisconsin Conservation Easements, *supra* n. 100, at 358.

¹⁰⁴ An overwhelming majority of the restrictions granted in Massachusetts were perpetual.

¹⁰⁵ *Ebb B. Nay*, 19 T.C. 114 (1952) as cited in Wisconsin Conservation Easements, *supra* n. 100, at 358.

¹⁰⁶ *Wineberg v. Comm'r*, 326 F.2d 157 (9th Cir. 1963) as cited in Hillsberg, *supra* n. 65, at 5.

¹⁰⁷ Wisconsin Conservation Easements, *supra* n. 100, at 359-60.

¹⁰⁸ Hillsberg, *supra* n. 65, at 5.

¹⁰⁹ *Id.* at 1-6.

¹¹⁰ 10 B.T.A. 1024 (1928).

¹¹¹ See n. 82 *supra*.

¹¹² Wisconsin Conservation Easements, *supra* n. 100, at 362-63.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Inaja Land Co., Ltd., 9 T.C. 727,735 (1947) as cited in Wisconsin Conservation Easements, *supra* n. 100, at 363.

¹¹⁶ See note 100 *supra*.

¹¹⁷ Barlowe, Ahl, & Bachman, *Use-Value Assessment Legislation in the United States*, 49 LAND ECON. 206, n. 1 (1973) [hereinafter cited as Barlowe].

¹¹⁸ MASS. GEN. LAWS ANN. ch. 59, § 38 (1973).

¹¹⁹ South v. Texas Eastern Transmission Corp., 332 S.W.2d 442 (Tex. Civ. App. 1960); Nantahala Power and Light Co. v. Sloan, 227 N.C. 151, 41 S.E.2d 361 (1947).

¹²⁰ Boston Gas Co. v. Assessors of Boston, 334 Mass. 549, 137 N.E. 2d 462 (1956).

¹²¹ *Id.*

¹²² Niles v. Bd. of Assessors, 2 Mass. B.T.A. 1, 2 (1933).

¹²³ 216 Mass. 260, 103 N.E. 635 (1913).

¹²⁴ 216 Mass. 263, 103 N.E. 636 (1913).

¹²⁵ Nantahala Power and Light Co. v. Sloan, 227 N.C. 151, 41 S.E. 2d 361 (1947).

¹²⁶ Tennessee Gas and Transmission Co. v. Jackman, 311 Ky. 507, 224 S.W.2d 660 (1949).

¹²⁷ Lancey v. City of Boston, 186 Mass. 128, 71 N.E. 302 (1904).

¹²⁸ MASS. GEN. LAWS ANN. ch. 59, § 11 (1973).

¹²⁹ Nyczepir v. State of New York, 76 Misc. 2d 804, 350 N.Y.S.2d 574 (1973); Conservation Law Foundation flyer, "How to Live with Conservation Restriction."

¹³⁰ Gustafson v. State of New York, 76 Misc. 2d 260, 350 N.Y.S.2d 321 (1973).

¹³¹ Conservation Law Foundation flyer, "How to Live with Conservation Restrictions."

¹³² *Id.*

¹³³ A conservation restriction on land where existing zoning and other legal restrictions are already in effect, and where "there is no reasonable probability that existing restrictions may be lifted within a reasonable time," may cause less diminution in value than one upon land where such restrictions do not exist, or if they do exist, may be lifted "within a reasonable time." City of Austin v. Cannizzo, 153 Tex. 324, 267 S.W.2d 808, 815 (1954).

¹³⁴ Two state bodies, the Department of Natural Resources and the Appellate Tax Board, are in positions of authority in this area and may set up guidelines for assessors in reassessing restricted land. To date, however, no guidance has been forthcoming from these bodies.

¹³⁵ This is the practice of the Board of Assessors in Topsfield in regard to undevelopable land, including farms and golf courses. *See* n. 131 *supra*.

¹³⁶ W. Beeman, *THE PROPERTY TAX AND THE SPATIAL PATTERN OF GROWTH WITHIN URBAN AREAS*, Urban Land Institute Research Monograph No. 16 (1969).

¹³⁷ *Rapley v. Montgomery County*, 261 Md. 98, 274 A.2d 124 (1971). The owners did pay, however, a transfer tax of almost \$231,000.00 upon conveyance of the land.

¹³⁸ Whyte, *supra* n. 2, at 42.

¹³⁹ *Id.* at 43.

¹⁴⁰ *Id.*

¹⁴¹ 257 Wis. 329, 43 N.W. 2d 458 (1950).

¹⁴² Landowner was a farmer. The court instructed that any benefit accruing to the owners due to the now easy accessibility to the highway and market must be considered and could be deducted from his damages. *Id.* at 459.

¹⁴³ *Murphy v. City of Bismarck*, 109 N.W.2d 635, 636 (N.D. 1961).

¹⁴⁴ *State ex rel. City of St. Paul v. District Court of Ramsey County*, 75 Minn. 292, 77 N.W. 968 (1899).

¹⁴⁵ Whyte, *supra* n. 2, at 43 and 43 n. 32.

¹⁴⁶ J. Pickard, *CHANGING URBAN LAND USES AS AFFECTED BY TAXATION*, at 33, Urban Land Institute Research Monograph No. 6 (1962).

¹⁴⁷ MASS. GEN. LAWS ANN. ch. 61A, §§ 12, 13 (Supp. 1974). Barlowe, *supra* n. 117, at 209.

¹⁴⁸ MASS. GEN. LAWS ANN. ch. 61A, §§ 1-24 (Supp. 1974).

¹⁴⁹ "[T]en years from the date of its acquisition or the earliest date of its uninterrupted use by the current owner in agriculture or horticulture, whichever is earlier. . ." *Id.* § 12.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* § 13.

¹⁵² *Id.* This section also states that rollback taxes need not be paid "if the land involved is purchased for a public purpose by the city or town in which it is situated."

¹⁵³ "[Rollback taxes] provide a curb or penalty for shifting [use], but when the rollback period is short, they represent only a

slight deterrent for the speculator who plans to hold his lands at low tax cost while he waits for his expected market to emerge." Barlowe, *supra* n. 117, at 211.

¹⁵⁴ *Id.* at 210.

¹⁵⁵ *General Guidelines for Assessors, Town of Barnstable, Conservation Restrictions.*

¹⁵⁶ A sample clause would be: "If land is taken by the town then this deed is void and the grantor is entitled to full damages." Brewster #1. See also Eastham #1, 4; Duxbury #1; n. 154 *supra*. Another termination clause prescribes that the restriction become void if the town ceases to use adjoining land exclusively for conservation purposes. Marblehead #1. Of interest is the section of the Agricultural and Horticultural Land Act providing that where property assessed at use value under the Act is taken by eminent domain, the value of the property will be determined according to normal condemnation procedures, with the amount of the conveyance tax, if any, added to the condemnation payment as an added value. MASS. GEN. LAWS ANN. ch. 61A, § 12 (Supp. 1974).

¹⁵⁷ Whyte, *supra* n. 2, at 21. But see Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 694-99 (1973), suggesting that zoning can result in great administrative and preventive costs.

¹⁵⁸ Hillsberg, *supra* n. 65, at 1.

¹⁵⁹ *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*, 40 N. J. 539, 193 A.2d 232 (1963).

¹⁶⁰ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

¹⁶¹ "[Zoning] has been used too extensively, particularly in situations where compensation was clearly owed to the regulated landowner." Eveleth, *An Appraisal of Techniques to Preserve Open Space*, 9 VILL. L. REV. 559, 591 (1964) [hereinafter cited as Eveleth].

¹⁶² Whyte, *supra* n. 2, at 15-20.

¹⁶³ *Id.* at 21.

¹⁶⁴ *Id.* at 22.

¹⁶⁵ Slavin, *Toward a State Land-Use Policy*, 4 LAND USE CONTROLS ANNUAL, No. 4, at 44 (1970).

¹⁶⁶ 200 Va. 653, 107 S.E.2d 390 (1959) [hereinafter cited as Fairfax County].

¹⁶⁷ *Board of County Supervisors of Fairfax County v. Carper*, 200 Va. 653, 107 S.E.2d 390, 396 (1959).

¹⁶⁸ Comment, *Techniques for Preserving Open Space*, 75 HARV. L. REV. 1622, 1627 (1962).

¹⁶⁹ Due to an increase in distance of available areas from the city and/or the betterment theory. See text at nn. 140-44 *supra*.

¹⁷⁰ 344 Mass. 428, 183 N.E. 2d 118 (1962).

¹⁷¹ Board of Appeals of Hanover v. Housing Appeals Comm., Board of Appeals of Concord v. Housing Appeals Comm., 294 N.E.2d 393, 417 (1973). See also MacGibbon v. Board of Appeals of Duxbury, 356 Mass. 642, 255 N.E.2d 348 (1970), recommending use of conservation restrictions where the preservation of private land was involved and zoning was inapplicable.

¹⁷² Eveleth, *supra* n. 161, at 591.

¹⁷³ Rose, *A Proposal for the Separation and Marketability of Development Rights as a Technique to Preserve Open Space*, 2 REAL ESTATE L. J. 635 (1974) [hereinafter cited as Rose].

¹⁷⁴ *Id.* at 651.

¹⁷⁵ *Id.* at 652.

¹⁷⁶ Comment, *Development Rights Transfer in New York City*, 82 YALE L. J. 338 (1972).

¹⁷⁷ Costonis, *supra* n. 48.

¹⁷⁸ Rose, *supra* n. 173, at 648.

¹⁷⁹ Under Floor Area Ratio zoning a building is allowed a certain amount of floor area depending upon the size of the lot on which it stands.

¹⁸⁰ A program developed by the Rural Land Foundation of Lincoln, Massachusetts responded to the criticism "that it provided homes only for the well-to-do" by acquiring an additional 69-acre tract, planning to set 46 of these acres aside as open space and to construct 123 moderate income housing units and a modern commercial area on the remaining 23. See Bergen, *The Rural Land Foundation of Lincoln, Mass.*, CASE STUDIES IN LAND CONSERVATION (Case #1), The New England Natural Resources Center, 225 Franklin Street, Boston, MA. 02210.